STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

Illinois Commerce Commission, on its own Motion,	:	
v.	:	**No: 01-0707**
Peoples Gas Light and Coke Company,	:	
Reconciliation of revenues collected under Gas adjustment charges with actual costs Prudently incurred.	:	

STAFF WITNESSES OF THE ILLINOIS COMMERCE COMMISSION'S RESPONSE TO PROPOSED PROTECTIVE ORDER

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July 20, 2004

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RESPONSE TO PROPOSED PROTECTIVE ORDER

Now come the Staff Witnesses of the Illinois Commerce Commission ("Commission") by their attorneys, Sean R. Brady and James E. Weging, and, pursuant to the schedule set by Administrative Law Judge Sainsot at hearing, file this Response to the proposed Protective Order ("Response"), presented to the proposed Protective Order ("Protective Order") by Administrative Law Judge Sainsot at hearing on July 13, 2004. The Staff Witnesses ("Staff") will approach the proposed Protective Order in *seriatim.* This approach does not indicate the relative importance of the issues to the Staff.

I. GENERAL ISSUES

A. Staff should not be Subject to the Protective Order Since the Public Utilities Act Provides Sufficient Protection

The Protective Order subjects Staff to the requirements and processes set forth therein. Such a cautionary measure is unneeded since Staff, unlike a Party, is subject

to certain provisions within the Public Utilities Act, 220 ILCS 5 namely, the provision of adequate protection of confidential and proprietary information furnished or delivered to Staff as part of the Commission (220 ILCS 5/4-404) and criminal penalties for the unapproved divulging of information that has been obtained by Staff during an investigation (220 ILCS 5/5-108).

Peoples Gas, Light and Coke Company ("Peoples") has made no showing that the Commission should subject itself to the Protective Order. There has been no showing that the documents covered by the Protective Order are of such a character that the statutes do not adequately protect the "confidential, proprietary or trade secret nature of any data, information or studies" and prevent competitive harm.

Staff objects to this Protective Order applying to Staff without a showing that the statutes do not adequately protect the other parties' interests. Staff therefore proposes that language be added to the Protective Order that expressly acknowledges that it does not apply to Staff:

> The provisions of this Protective Order do not apply to Commission Staff. Commission Staff is subject to the requirements of Sections 4-404 and 5-108 of the Public Utilities Act. (220 ILCS 5/ 4-404 & 5-108).

B. Peoples Has Burden of Identifying which Documents Deserve Protection and Proving the Claimed Documents Deserve Protection

Peoples has not shown why the documents it cited from the Freedom of Information Act, 5 ILCS 140 et seq., require protection. There has been no showing that all of the 99,000+ documents and 200,000+ electronic documents possess "confidential, proprietary or trade secret nature." 83 Ill. Admin. Code 200.430(a). Staff agrees that some form of a protective order is needed for some documents but not all. Staff recommends that the Protective Order be limited to either financially and

commercially sensitive information and trade secrets that Peoples identifies, or those documents Peoples shows that "if *revealed in* a competitive setting" the information would cause Peoples harm.

Section 200.430(a) of the Commission's Rules of Practice, *supra*, allows a party to obtain a protective order for "an order to protect the confidential, proprietary or trade secret nature of any data, information or studies." Although Section 200.430(a) does not expressly state that a showing is required, one is implied, since the Illinois Freedom of Information Act creates a presumption that public records are to be open and accessible. *See* Illinois Education Ass'n v. Illinois State Board of Education, 204 Ill.2d 456, 462-63 (2003). The movant, therefore, has the burden of showing that a protective order is needed; however, there are no Commission orders discussing the movant's burden. Illinois Supreme Court Rule 201(c)(1) may be informative in this matter. Supreme Court Rule 201(c)(1) does not set any specific requirements for protective orders; the provision has the broad standard "as justice requires." Illinois Appellate Courts have acknowledged that the trial court "is allowed the flexibility to use its own knowledge and experience in deciding whether justice requires the prevention of abuses to the discovery process through the imposition of the proposed protective order." *See e.g.*, Avery v. Sabbia, 301 Ill. App. 3d 839, 847 (1st Dist. 1998).

A protective order shouldn't be granted simply because Peoples has produced a lot of documents. Peoples needs to demonstrate a need for protection and not just to allege a harm. In the *Motion of The Peoples Gas Light and Coke Company for the Entry of A Protective Order* ("Motion"), Peoples acknowledges that not all of the documents are confidential, proprietary or contain trade secrets. Motion at ¶3. Its

Motion fails to prove that the documents it is claiming protection for, or even the documents that are the subject of the Protective Order, contain information of a confidential, proprietary or trade secret nature. Analyzing the claims Peoples has set forth in its Motion, the fourth paragraph of its Motion sets forth broad claims but lacks specific showing of how Peoples or its non-utility affiliates would be harmed. It simply states that the documents

> include Peoples Gas and its non-utility affiliates' business methods, plans, procedures, preliminary drafts, notes, recommendations, memoranda, valuable formulae, designs, drawings, research data that could reasonably be expected to produce private gain, and records in which opinions are expressed or which policies or actions are formulated." Motion, ¶4.

The reasoning Peoples sets forth in the fifth paragraph of its Motion also falls short of making the needed showing. In that paragraph, Peoples states the need is because of the ease in which electronic documents can be disseminated. Id. at ¶5. Without a specific showing of harm, there should be no protective order.

This information should not be afforded an "umbrella" protective order because it relates to transactions that occurred three or more years ago with third party entities, such as enovate, LLC, that no longer exist. It is unclear to Staff how this information, if revealed today, would cause harm in a competitive setting. Another indication that the Protective Order is too broad is that it affords protection to blank sheets of paper. See various Responses of CUB, City of Chicago, etc.

The scope of the Protective Order should be narrowed. It should only apply to the documents that contain financially and commercially sensitive information and trade secrets. In the alternative, the Protective Order should protect those documents that would cause harm to Peoples today "if *revealed in* a competitive setting," (which is the

test set forth in the proposed Protective Order), or used "to produce private gain" (which are concerns set forth in paragraph 4 of the Motion). Since these are Peoples' documents and Peoples is the movant, Peoples has the burden of making such a showing. If Peoples fails to make a sufficient showing of harm, then the protective order should be denied.

II. ISSUES SPECIFIC TO THE PROPOSED PROTECTION ORDER

A. Definitions

1. Material Subject to the Attorney-Client Privilege

The proposed Protective Order contains the following definition:

> "'Materials subject to the attorney-client privilege' is all material that falls within the scope of Sup. Ct. Rule 201(b)(2)"

There is a problem with the definition. While all privileged attorney-client materials fall within Supreme Court Rule 201(b)(2), "all material that falls within the scope of Supreme Court Rule 201(b)(2)" includes much more than privileged attorney-client materials. As far as Staff knows, attorney-client and attorney work product are the only privileges asserted by Peoples. (This is based both on the arguments made by Peoples as well as examination of the Privilege Log produced by Peoples in response to Staff's and CUB's requests for documents.)

Staff, therefore, asserts that the definition creates a vague, indefinite privilege definition, that is difficult if not impossible to examine. Staff instead suggests a definition limited to attorney-client privilege materials.

> "'Materials subject to the attorney-client privilege' are the attorney-client materials recognized as privileged by Sup. Ct. Rule 201(b)(2)."

2. Notification in Writing Defined but Not Used

The Protective Order provides a definition for "Notification in Writing" but the phrase is not used in the document itself. Paragraph 3 requires "a party or Commission Staff shall notify counsel for Peoples, in writing." If this definition was intended to apply to this phrase, Staff suggests the "Notification in Writing" be removed from the definition section and included as a sub-section of paragraph 3; otherwise, inclusion of the definition is confusing.

B. Disclosure to Other Parties (Pars. 1-4 of the Protective Order)

1. Exemption for Certain Third Parties

The Protective Order fails to address the most likely nonparty requests for materials -- subpoena by another governmental body or by a party involved in a court proceeding. Although technically such a subpoena goes to the Commission, this Protective Order technically binds the Commission as well. The Protective Order should have a specific exclusion from the procedures contained in paragraphs 2 through 4 of the Protective Order for documents that are retained by the Commission and are subpoenaed by a governmental body or for a court proceeding.

Also, there is pending for signature by the Governor Senate Bill 2907 ("Bill") . This Bill, if signed in its current form, will amend the Public Utilities Act with new Section 4-601. This section will require the Commission and its Staff to work with law enforcement authorities, especially the Attorney General and the State's Attorneys, in matters involving consumer protection. Already under Section 6.5(d) of the Attorney General Act , 15 ILCS 205/6.5(d), the Illinois Attorney General enjoys special rights to

get Commission documents in matters admittedly outside the scope of the present proceedings.

Staff therefore proposes that language be added to the Protective Order as a separate paragraph:

> "This Protective Order does not apply to requests for information from law enforcement officials or to subpoenae properly served on the Commission."

2. Scope of the Protective Order is Too Broad

If a protective order is needed for some documents, it should not apply to all documents produced since February 10th of this year.

Paragraphs one and two of the Protective Order define the scope of documents covered by the Protective Order, stating that it applies to "all documents tendered by Peoples . . . on or after February 10, 2004". This scope of application is too broad. First, it is not limited to documents tendered pursuant to discovery. Second, Staff has issued data requests that are not related to the matters ruled upon on February 10, 2004.

Assuming that the February 10th date was chosen because the Administrative Law Judge's ruling was issued on that date, then any data requests and questions that were not related to that ruling should be excluded. There are four such instances related to Staff's data requests. Peoples produced the response to Staff data request POL 15 on February 17, 2004. However, POL 15 is not related to the Feb 10th ruling, since POL 15 was issued on January 21, 2004. The second instance is part of Staff data request POL 16, which were follow-up questions to the responses to POL 15. Questions 16.1 to 16.51 are clearly delineated as being follow-up questions to POL 15

and, therefore, should not be included in the Protective Order. The third instance is Staff data request POL 19, since POL 19 relates to audio recording of gas transactions with third party entities. The fourth instance is POL 17 which relates to the rebuttal testimony filed by Peoples' witness, Mr. David Wear.

Since the responses to these requests are not related to the ALJ's decision on February 10th, these documents in response to those questions should not be included in the Protective Order.

Staff therefore proposes that language be added to the first paragraph of the Protective Order:

> "1. All documents tendered by Peoples to any party in this docket or to Commission Staff Witnesses ("Staff") on or after February 10, 2004, but not including discovery unrelated to the ALJ's ruling on that date such as Staff Witnesses' data requests POL 15, 16, 17, or 19 and that fall within the scope of the definitions above of proprietary material or attorney-client materials *shall not be disclosed* to any person or entity that is not Commission Staff or a party to this proceeding."

3. Challenges to Peoples' Redaction of a Document

Paragraph 3 does not authorize, or provide a process, by which a party can raise a dispute regarding a document that has been redacted by Peoples. Staff recommends that language be added to paragraph 3 of the Protective Order that establishes such a process.

Paragraph 3 of the Protective Order gives Peoples three courses of action once a party has requested the opportunity to disclose a document.

> Peoples shall, during the following five (5) business days, do one of the following:
>
> (a) authorize disclosure of the document(s) or;
>
> (b) authorize disclosure of the document(s) and redact material(s) that fall within the definitions of attorney-client privilege or proprietary

information herein; or

(c) serve the AU and counsel of record with a motion setting forth that there is a dispute and the nature of that dispute.

The procedure set forth in paragraph 3 of the Protective Order fails to provide a mechanism that allows a party to challenge the propriety of the material that was redacted. Staff recommends the following language be added after (c), but remain unnumbered since it should be a continuation of the body of the initial paragraph:

> If Peoples redacts a portion of a document, and there is a dispute regarding: (a) the sufficiency of the justification of the harm, or (b) the redacted portion of the text being overly broad, a Party may serve the ALJ and counsel of record with a motion setting forth a dispute and nature of that dispute.

If Staff is subject to the protective order then the proposed paragraph should be modified to include Staff.

C. Trial Practice (Pars 5-8 of the Protective Order)

In these provisions, the Protective Order seems to go beyond the public disclosure of proprietary or privileged documents and to how proprietary or privileged documents are to be handled at hearing. Staff would strenuously object if this Protective Order were to be read as requiring preview by Peoples (par. 3 of the Protective Order) of proprietary documents being introduced by other parties prior to tendering at hearing. Assuming that a sealed presentation of proprietary or privileged materials at a Commission hearing does not constitute disclosure to a nonparty to this proceeding, as defined in the Protective Order, Staff makes the following comments.

1). The proposal of prefiling hard copies of proprietary or privileged materials could not include cross-examination (since the witness may agree to whatever the information is so that impeachment by producing the documents may become unnecessary). Also oral rebuttal may need to have additional proprietary or privileged material produced, which can only be determined after cross-examination is completed by the other parties.

2). There have been occasions where the Court Reporters have inadvertently filed on e-docket the confidential rather than the redacted version of an exhibit.

Staff therefore proposes that language be added to paragraph 5 of the proposed Protective Order:

> "5. At trial, if Commission Staff or a party seeks to introduce material in their own direct, rebuttal, or surrebuttal testimony that falls within the definitions herein of proprietary information, or the attorney-client privilege, the protected material, whether it is document(s) or testimony, shall be filed under seal and the non-protected evidence or testimony shall be filed in a publicly available format. The parties and Commission Staff shall tender hard copies of any documents filed under seal to the ALJ prior to trial."

D. Fines (Par. 9 of the Protective Order)

In the first place, Staff is subject to the criminal penalty of Section 5-108 of the Public Utilities Act, 220 ILCS 5/ 5-108, for the public disclosure of public utility information, coming to Staff's knowledge during the course of Staff's investigation of the public utility, unless authorized by the Commission or the circuit court. No one has suggested that this rather grave penalty is insufficient.

In the second place, as it applies to violations committed by Staff, the Protective Order is essentially providing a fine on the Commission. Staff is not a party independent or separate from the Commission. 83 Ill. Adm. Code 200.40 (def. of

"party", "staff' and "staff witness"). For certain statutory purposes, the Staff Witnesses are separated from the rest of the Staff. However, although the functions are different within a Commission proceeding, the Staff Witnesses are seeking the proper application of the policies and provisions of the Public Utilities Act, just like the decisional group in the proceeding (the ALJs, the Commissioners, and their assistants). Of course, besides the criminal penalty of the statute, the Commission holds the termination of employment of a Staff Witness who violates the law.

In the third place, Staff doubts that there is jurisdiction to create this proposed fine. The Commission has recently been given the authority to assess civil penalties against public utilities directly for violations of the Public Utilities Act, *i.e*., civil penalties earlier could be assessed only by the Circuit Court on complaint of the Commission. 220 ILCS 5/ 4-203. However, none of the provisions granting the Commission the ability to impose a civil penalty allows the penalizing of parties to a Commission proceeding without a hearing. The Commission's broadest direct authority over penalties is over "a public utility, any corporation other than a public utility, or any person acting as a public utility…" 220 ILCS 5/ 5-202.

Although the General Assembly can delegate civil penalty authority to an agency, in the absence of any such delegation to this Commission, the creation of fines in a Protective Order appears to be beyond the authority of this agency.
City of Waukegan v. Pollution Control Board, 57 Ill. 2d 170 (1974) [discretionary civil penalties can be delegated to administrative agencies by the General Assembly, provided there are sufficient standards and safeguards on the power of the agency to impose the penalty] and *Norton v. City of Chicago,* 293 Ill. App. 3d 620, 630 (1st Dist.

1997) [$3 surcharge was unauthorized by any statute and constituted unjust enrichment].

Staff suggests that paragraph 9 of the proposed Protective Order be eliminated.

III. CONCLUSION

WHEREFORE, Staff Witnesses asks that no Protective Order which includes Staff be entered, that no Protective Order be entered until Peoples Gas, Light and Coke Co. meets its burden of proof to specify which documents are proprietary or privileged, that the Protective Order be amended as specified above, or such other different or additional changes be made as the law and justice may allow.

Respectfully submitted,

_____

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STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

ILLINOIS COMMERCE COMMISSION, On Its Own Motion -vs.- **PEOPLES GAS, LIGHT AND COKE COMPANY** Reconciliation of revenues collected under gas adjustment charges with actual costs prudently incurred.	)	DOCKET NO. **01- 0707**

NOTICE OF FILING

TO: Parties on Service List

PLEASE TAKE NOTICE that I have, on this 20th day of July, 2004 A.D., filed with the Chief Clerk of the Illinois Commerce Commission, the Response of the Staff Witnesses to the Proposed Protective Order, a copy of which is hereby served upon you.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the above Notice, together with a copy of the document referred to therein, have been served upon the parties to whom the Notice is directed by e-mail or, if without an e-mail address, by first class mail, proper postage prepaid, from Chicago, Illinois on the 20th day of July, 2004 A.D.

_____

JAMES E. WEGING

ICC Docket No. 01-0707

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